Supreme Court, U. S.
FILED
OCT 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-584

UNITED STATES OF AMERICA for the Use of JAMES SINCLAIR, and JAMES SINCLAIR,

Petitioners,

vs.

THE HANOVER INSURANCE COMPANY, a corporation; GAYLORD L. CAMPBELL; TERRY WALTER; and THOMAS CHARLES KUPFERER, JR.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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THE HANOVER INSURANCE COMPANY, a corporation; GAYLORD L. CAMPBELL; TERRY WALTER; and THOMAS CHARLES KUPFERER, JR.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

James Sinclair prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled case for the reason that the judgment is in direct conflict with decisions in the Fifth, Eighth, and District of Columbia Circuits; and is in direct conflict with the decisions of this Court in *Lammon v. Feusier,* 111 U.S. 17; *Covell v. Heyman,* 111 U.S. 176, and *Robertson v. Sichel,* 127 U.S. 507.

Citations to Opinions Below.

The opinions below are unreported and are printed *infra* in the Appendix, the District Court not writing an opinion as such but its Order Dismissing Complaint did state the court's reasoning.

Jurisdiction.

The judgment of the Court of Appeals was entered May 7, 1976, and the petition for rehearing and rehearing in banc was filed May 21, 1976, and was denied by order filed August 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented for Review.

May a Court of Appeals without citation of any authority ignore the universal body of the law of other Circuits and the Supreme Court to decide that an injured individual has no right to sue on the official bond of a U.S. Marshal?

Is a Marshal still liable for the official acts of his deputies under *Robertson v. Sichel,* 127 U.S. 507, 515?

Statement of the Facts of the Case.

Under common law authority of *United States v. Davidson,* 25 Fed. Cases 771, Case # 14,921 (1864), petitioner brought this action for damages in the name of the United States for his use, on the official bond written by respondent Hanover Insurance Company for respondent U.S. Marshal G. L. Campbell, alleging illegal seizure, search, and abuse by the marshal's deputies who were also sued, and alleging the marshal's ratification, encouragement, and negligence.

Jurisdiction was founded on multiple bases: 28 U.S.C. Sec. 1352 (official bond); the Fourth Amendment to the Constitution of the United States; diversity of citizenship with the matter in controversy exceeding the value of $50,000.00; pendent jurisdiction; and further federal questions involving the Fifth Amendment to the Constitution of the United States, and Federal Rules of Criminal Procedure 5.

The deputies admitted that the petitioner was searched and that no contraband or weapons were found, and that petitioner was held for a while and later released without any charges being brought. The deputies admitted that the petitioner was accosted at an airport while petitioner was leaving a gate after all parties knew the plane had left.

The District Judge dismissed the Marshal from the action under F.R.C.P. 12(b)(6), retaining the deputies and the bonding company as defendants (no details for this dismissal were given; the Court of Appeals found the complaint stated a claim for relief against the Marshal, and reversed).

The bonding company Hanover Insurance Co. moved to dismiss before filing an Answer. The District Judge granted the motion on the grounds that the surety could not be liable if the principal were not liable. The Court of Appeals affirmed the dismissal of Hanover even though they reversed as to the Marshal; the

court held that an individual had no right to sue on the bond; petition for rehearing and rehearing in banc citing the authorities *infra* was denied.

The deputies' second motion for summary judgment was granted. Petitioner appealed the resulting District Court judgment dismissing the action. The Court of Appeals reversed the judgment which had been in favor of the deputies, holding that there were triable facts and stated that the allegations of abuse were sufficient to state a claim upon which relief can be granted.

Therefore the petitioner applies to this Court to review the judgment of the Court of Appeals insofar as it affirmed the dismissal of the Hanover Insurance Co.

REASONS FOR GRANTING THE WRIT.

Petitioner respectfully submits that the judgment of the Ninth Circuit Court of Appeals that Hanover can not be liable to an individual on the bond of the Marshal conflicts with the decisions in the Fifth, Eighth, and District of Columbia Circuits, the decisions of this Court, and the bond itself.

The first paragraph of the Memorandum of the Court of Appeals states that Hanover made a "promise to indemnify" only the United States for the actions of the Marshal or deputies, and that therefore the individual James Sinclair has no rights to sue on the bond for his injuries.

It is important to note that the Court of Appeals neither cited authority, nor distinguished the bond recovery cases cited to it. Nor will respondents be able to do so in reply to this Petition. There is apparently *no* case saying an individual as such can not recover on the bond of a Marshal.

This Court in *Lammon v. Feusier,* 111 U.S. 17 (1884) affirmed a Nevada federal court judgment that the sureties on the marshal's bond were liable, not to the government, but to private party Henry Feusier. At page 19 is noted that the bond is nominally to the *government,* to indemnify the *injured party. Covell v. Heyman,* 111 U.S. 176 (1884), on page 181 refers to "A third person" having a "remedy for damages" "against his sureties" (of the marshal). *Gwin v. Barton,* 6 How. 7 (47 U.S. 7) (1848), states on page 10 that an individual is to "proceed regularly by action" if he seeks "to charge the sureties for the default of the marshal".

The District of Columbia Circuit affirmed in *Colpoys v. Foreman,* 163 F.2d 908 (1947), noting on page 909 that:

> "The plaintiff recovered judgment for $6,500. The defendants, the marshal's executors and *surety,* have appealed." (Emphasis added.)

The Eighth Circuit held the surety liable for $600 damages to an individual in *Bailey v. Warner,* 118 Fed. 395, 396 (1902).

The Fifth Circuit in *Hinds v. Keith,* 57 Fed. 10 (1893), affirmed a judgment for Keith against sureties Sheats, Green, Peevy, and Harrison (p. 12).

Hagood v. Blythe, 37 Fed. 249, 252 (1889) states:

> "Let plaintiff have judgment against each surety in the sum of $173.43."

These bonds were provided for by the First Congress (1 Stat. 87), since it was known that marshals were likely to be judgment-proof and that security was required for both the government and for its individual citizens (1 Op. Atty. Gen. 92). The principle goes back at least to 1662 in English statutes. Also see *County of Hawaii v. Martin,* 33 Haw. 677, 685; *Hill v. Thomas,* 70 Nev. 389, 395-396. At present petitioner does not even have security that he can recover his costs on the appeal he has won, marshal's wages not being reachable by execution!

The very bond put forward into court by Hanover stated, as also alleged in the Complaint, "A person . . . . may sue thereon, in his own name".

There is a further importance to this case warranting grant of certiorari. The bond has a total value of some $3,000,000.00 for abuse of airport searches for

93 marshals, and the statute of limitations is open until 1978. This abuse is so prevalent that the Illinois legislature has enacted an airport exclusionary rule! Illinois Statutes, ch. 38, sec. 84 (1973). Also as to abuse, *Sen. Hartke v. FAA,* 369 F.Supp. 741.

It is worthy of this Court's attention to make sure that persons injured by marshals in person or property can recover on the bond as they were intended so to recover.

There is a final point for review. The Court of Appeals stated that the "contention is without merit" that the Marshal is liable for the acts of his deputies. (footnote, A-4, *infra*).

However, *Robertson v. Sichel,* 127 U.S. 507, 515 (1888) states:

> "a superior officer may be held liable for . . . . the act of a *deputy* performed in the ordinary line of his official duty as prescribed by law." (Emphasis added.)

Holden v. Williams, 75 Fed. 798, 800 (D.C. Alaska 1896) states re U.S. marshals:

> "The rule that the superior officer is liable for acts of his deputy done under color of his office is too well settled to need discussion.
>
> The demurrer is overruled."

Elyea v. Williamson, 59 Ga. 432 (1876) *holds* that an injured party can *not* sue a deputy U.S. marshal because under common law he can sue only the marshal himself for the acts of the deputy!

The Ninth Circuit would encourage the employment of irresponsible deputies. However, the original statutory

scheme was that of inter-liability tending to secure responsible officers: the surety was responsible for both the marshal and the deputy, and was subrogated against them. The marshal being principal on the bond was thereby liable for the default of the deputy. The marshal required the deputy to furnish a bond to indemnify the marshal, as the marshal was liable for the deputy over and above the amount of the marshal's own bond. Irresponsible persons would find it hard to secure bonds, and the public would thus be protected against them to begin with.

It is worthy of this Court's writ of certiorari that responsibility is encouraged, in this day where products and government are too often shoddy. As the Second Circuit said on remand (*Bivens v. Six Agents,* 456 F.2d 1339, 1346 (1972)):

> "The policy underlying this common law rule is equally applicable to federal police officers. We believe the long line of cases culminating in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), indicates a woeful laxity on the part of some police officers, state and federal, in complying with constitutional standards, and this laxity would only be encouraged by a grant of immunity. We do not agree with the reasoning of cases that support a contrary conclusion. It would be a sorry state of affairs if an officer had the 'discretion' to enter a dwelling at 6:30 A.M., without a warrant or probable cause, and make an arrest by employing unreasonable force."

Conclusion.

Because of the manifest error of the Court of Appeals, the lack of authority to contradict petitioner's argument, and the importance of setting right the Marshal system, the petitioner contends that certiorari should be granted to resolve the conflict of the Ninth Circuit opinion, probably with summary reversal, or remand to consider the decisions such as *Lammon v. Feusier,* 111 U.S. 17, and *Robertson v. Sichel,* 127 U.S. 507, 515.

October, 1976.

Respectfully submitted,

JAMES SINCLAIR,
Petitioner Pro Se.

APPENDIX

APPENDIX.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

United States of America for the Use of James Sinclair, and James Sinclair, Plaintiffs-Appellants, v. The Hanover Insurance Company, a corporation; Gaylord L. Campbell; Terry Walter; and Thomas Charles Kupferer, Jr., Defendants-Appellees. No. 74-2151, DC #73-1131-R-Civil.

Appeal from the United States District Court for the Central District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in favor of Hanover. Judgment in favor of Gaylord C. Campbell, Terry Walter and Thomas Charles Kupferer, Jr., is reversed and the case is remanded for further proceedings.

Filed and entered May 7, 1976.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

United States of America for the Use of James Sinclair, and James Sinclair, Plaintiffs-Appellants, vs. The Hanover Insurance Company, a corporation; Gaylord L. Campbell; Terry Walter; and Thomas Charles Kupferer, Jr., Defendants-Appellees. No. 74-2151.

Filed: Aug. 13, 1976.

Before: Merrill, Hufstedler and Kennedy, Circuit Judges.

The panel as constituted in the above case has voted to deny appellants' petition for rehearing. Judges Hufstedler and Kennedy voted to reject the suggestion for a rehearing in banc and Judge Merrill recommended rejection. The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Appellees' tardily tendered petition for rehearing or clarification may be filed. The petition is denied. Judge Kennedy would grant rehearing.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

United States of America for the Use of James Sinclair, and James Sinclair, *Plaintiffs-Appellants,* vs. The Hanover Insurance Company, a corporation; Gaylord L. Campbell; Terry Walter; and Thomas Charles Kupferer, Jr., *Defendants-Appellees.* No. 74-2151.

[May 7, 1976]

On Appeal from the United States District Court for the Central District of California.

Before: MERRILL, HUFSTEDLER and KENNEDY, Circuit Judges.

Judgment dismissing the action against Hanover Insurance Company is affirmed. There is no showing

that the United States has suffered loss by virtue of actions of the Marshal or his deputies. Nor can such loss result from this action, where the United States is not named as defendant and judgment against it is not sought. Thus nothing has occurred (or could occur by virtue of this action) that would call upon Hanover to perform its promise to indemnify.

Judgment dismissing the action against Marshal Campbell and summary judgment in favor of his deputies were, in our view, premature.

As to the Marshal, while he did not himself play any part in the detention or search, the complaint does charge him with having occasioned such conduct through advising and encouraging his deputies to behave in such a fashion and disregard the rights of those with whom they have to deal. Appraising the sufficiency of the complaint in accordance with the standard set forth in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), we think that it alleges sufficient personal involvement on the part of the Marshal so as to state a claim for relief.

Further, allegations of the complaint to the effect that the Marshal negligently selected, trained and supervised his deputy would appear sufficient to withstand motion to dismiss under *Navarette v. Procunier,* ..... F.2d ..... (9th Cir. 1976).

We have only examined the allegations respecting Campbell in the context of a motion to dismiss. The extent to which other materials in the record would, if taken into consideration, serve to support summary judgment is a question we cannot anticipate at this time. The order granting motion to dismiss states that it was based on the "pleadings, the memoranda filed

by the parties, and the oral argument at the time of the hearing."[1]

As to the action against the deputies, any justification for their detention and search of Sinclair on the grounds that it was an airport search ended when it became apparent that Sinclair did not intend to board a plane at that boarding area. *United States v. Moore,* 483 F.2d 1361, 1363 (9th Cir. 1973); *United States v. Davis,* 482 F.2d 893 (9th Cir. 1973). We accept, arguendo, that founded suspicion would justify a brief detention and patdown under *Terry v. Ohio,* 392 U.S. 1 (1968). However, the detention that followed could only be justified as an arrest on traditional showing of probable cause to suppose Sinclair guilty of crime; and the search that accompanied it could only be justified as one incident to arrest and subject to the limitations that apply to such searches, *see United States v. Rothman,* 492 F.2d 1260, 1265-66 (9th Cir. 1973), *United States v. Mehciz,* 437 F.2d 145, 146-48 (9th Cir. 1971); or on a showing of probable cause to suppose that the search would be productive of evidence of crime which could well be lost if the search were to await warrant. *United States v. Smith,* 503 F.2d 1037, 1040-41 (9th Cir.

[1]On appeal Sinclair contends that without regard to the Marshal's own acts of commission or omission, he is liable for the acts of his deputies under the principle of *respondeat superior.* This contention is without merit. While the doctrine imposes liability on an employer (or master) for the wrongful acts of his agent (or servant), it does not (in absence of a statute to the contrary, *Hesselgesser v. Reilly,* 440 F.2d 901 (9th Cir. 1971)), impose liability on a public officer for the wrongful acts of his subordinates. *Robertson v. Sichel,* 127 U.S. 507 (1888); *Lander v. Morton,* 518 F.2d 1084, 1087 (D.C. Cir. 1975); *Boettger v. Moore,* 483 F.2d 86 (9th Cir. 1973). We reject appellant's contention that 28 U.S.C. §564 is designed to impose such liability on the Marshal; that provision relates solely to the scope of the coverage of the bond.

1974), *cert. denied* 419 U.S. 1124. On this record it cannot be said that such justification has been established as matter of law. The facts as to what actually occurred at the boarding area and after Sinclair left the area were controverted in the affidavits and must be resolved in fact-finding proceedings before judgment as to the deputies' justification may be rendered.

Moreover, in our view the allegations with respect to the deputies' threats were sufficient to state a claim of intentional infliction of emotional distress under California law. *State Rubbish Collectors Ass'n. v. Siliznoff,* 38 Cal.2d 330, 240 P.2d 282 (1952); *Alcorn v. Anbro Engineering, Inc.,* 2 Cal.3d 493, 468 P.2d 216, 86 Cal.Rptr. 88 (1970).

As to standards for judging immunity, both of Marshal Campbell himself and of his deputies, further light has been cast by recent decisions. The deputies cannot be held liable, even for an unconstitutional search and detention, if they "reasonably believed in good faith that [the detention and search were] constitutional * * *" *Pierson v. Ray,* 386 U.S. 547, 557 (1967); *Burgwin v. Mattson,* 522 F.2d 1213 (9th Cir. 1975). Judgment under this inquiry must await resolution of the factual issues presented in the affidavits.

The standards for judging immunity of Marshal Campbell are those set forth in *Scheuer v. Rhodes,* 416 U.S. 232 (1974), and *Mark v. Groff,* 521 F.2d 1376 (9th Cir. 1975). As was the case with the deputies, factual questions with respect to Campbell's activities must be resolved before the question of his immunity can be decided.

In all respects further proceedings are necessary. As to some issues, amplification of the record may

suffice to eliminate need for trial. As to all remaining issues, trial would appear to be necessary.

Judgment in favor of Hanover is affirmed.

Judgment in favor of Gaylord C. Campbell, Terry Walter and Thomas Charles Kupferer, Jr., is reversed and the case is remanded for further proceedings.

KENNEDY, J. Concurring:

I agree that the further development of the facts in this case is warranted. However, I would not limit the use of the airport search rationale to those persons intending to board airplanes. Here it appears that after a plane departed, Sinclair passed through the magnetometer at a boarding area, set off a positive reading, and then attempted to leave the airport. I consider this conduct potentially dangerous for two reasons: (1) he may have been testing the sensitivity of the magnetometer in preparation for a future attempt to carry a weapon on board an airplane; (2) he may have been carrying a weapon or device which he intended to use in the terminal or on a different flight. In a proper case, these possibilities might well support a finding that the search was justified under traditional doctrines, in light of exigent circumstances.

Airport searches are also justified under a theory of consent necessarily given as a condition of passing through a checkpoint. I would hold that such consent cannot be withdrawn after a person has alerted the detection device. The efficacy of such systems would be seriously undermined if potential terrorists got a free bite at avoiding detection. In our troubled times, a person who goes into a crowded airport and sets off a metal detector should not complain if the authorities are less than courteous.

Order Dismissing Complaint as to Defendant The Hanover Insurance Company.

United States District Court, Central District of California.

James Sinclair, Plaintiff, vs. The Hanover Insurance Company, a corporation; Terry Walter; and Thomas Charles Kupferer, Jr., Defendants. No. 73-1131-R.

FILED: Feb. 21, 1974.

Defendant The Hanover Insurance Company has moved for dismissal of the cause of action against it. The Court having heard the arguments of the parties and having considered the matter; the matter having been submitted and plaintiff having filed his Supplemental Opposition To Motion of Hanover for Dismissal Or For Summary Judgment;

IT IS ORDERED the motion is granted and the complaint is dismissed as to defendant Hanover Insurance Company. An indemnitor's liability is based upon the liability of the principal. The Court having determined there can be no liability visited upon the principal—defendant Gaylord Campbell having been heretofore dismissed—no liability can be visited upon the indemnitor. The bond here indemnifies Campbell's responsibility—either direct or vicarious—not the responsibility of deputy United States Marshals.

Dated: February 21, 1974.

/s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES SINCLAIR, PETITIONER

v.

THE HANOVER INSURANCE COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
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Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-584

JAMES SINCLAIR, PETITIONER

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THE HANOVER INSURANCE COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner was detained and searched by deputy United States Marshals at the Los Angeles airport. Subsequently he brought this suit against the United States Marshal, the deputies involved, and the insurance company that had issued a surety bond on the Marshal, claiming violation of his constitutional rights. The district court dismissed the action against the insurance company and the Marshal, who was not personally involved in the detention and search, and granted summary judgment for the deputies.

On appeal, the Ninth Circuit affirmed the dismissal of the insurance company, on the ground that the United States had not suffered any loss which would require the insurance company to perform its promise to indemnify, holding by implication that the bond was solely for the benefit of the United States. The court remanded the action against the Marshal and his deputies for further proceedings (Pet. App. A2 to A6).

On remand, on December 7, 1976, the district court dismissed the action from the bench because petitioner failed to appear for trial. We are informed that an order of dismissal was entered on December 21, 1976.

This case presents no issue warranting review by this Court at this time.

The order entered by the district court on December 21, 1976, dismissing the underlying suit in this case, essentially renders this petition moot. Although the dismissal may be subject to reconsideration by the district court or review on appeal, no suit for damages presently exists against the Marshal, his deputies, or the United States, for which the Hanover Insurance Company might be held liable on its bond. Under the circumstances, therefore, there is no reason for this Court to resolve the question whether Hanover could be liable under the terms of its bond.

Moreover, the scope of the bond is an issue of no continuing importance. Surety bonds such as the one herein involved are no longer required. Act of June 6, 1972, Section 101(a), 86 Stat. 201.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of November, A.D. 1976.

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THE HANOVER INSURANCE COMPANY, a corporation; GAYLORD L. CAMPBELL; TERRY WALTER; and THOMAS CHARLES KUPFERER, JR.,

Respondents.

Memorandum of the Hanover Insurance Company in Opposition.

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UNITED STATES OF AMERICA for the Use of JAMES SINCLAIR, and JAMES SINCLAIR,

Petitioners,

vs.

THE HANOVER INSURANCE COMPANY, a corporation; GAYLORD L. CAMPBELL; TERRY WALTER; and THOMAS CHARLES KUPFERER, JR.,

Respondents.

Memorandum of the Hanover Insurance Company in Opposition.

I

Summary of the Case.

The Petition of James Sinclair is directed solely toward the decision of the United States Court of Appeals, for the Ninth Circuit, which affirmed the dismissal of the Hanover Insurance Company (hereinafter referred to as Hanover) from the suit brought by Sinclair. The Petition does not concern the remaining defendants.

This case originated with a complaint filed by Sinclair. The complaint alleges a cause of action against Hanover and against United States Marshal,

Gaylord L. Campbell, and Deputy United States Marshals, Terry Walter and Thomas Charles Kupferer, Jr. The District Court dismissed the complaint as to Hanover and United States Marshal, Campbell. Subsequent to the dismissals of Hanover and Campbell, the District Court, based upon a Motion for Summary Judgment, entered a judgment in favor of Walter and Kupferer, and against plaintiff, James Sinclair.

The United States Court of Appeals, for the Ninth Circuit, affirmed the judgment of the District Court, dismissing the action against Hanover. The dismissal of the United States Marshal and the judgment in favor of the deputy Marshals were reversed. The case is presently before the United States District Court for further proceedings.

The complaint alleges a cause of action against Hanover, based solely upon the fact that Hanover had executed and delivered a "United States Marshal" Bond, as surety on behalf of the United States of America as obligee. (The bond was part of the record before the Court of Appeals, Record on Appeal pp. 147-148).

The bond was a position schedule bond for the Department of Justice. The bond contains a Schedule of Positions and lists in great detail each position covered. The bond in part as follows:

> "The Hanover Insurance Company, . . . hereby agrees to indemnify the United States of America, hereinafter termed Obligee,
>
> (1) against any loss or losses up to the bonded amounts stipulated for each United States marshal

> position in the Schedule of Positions, which any marshal may directly or by collusion with others, cause to the Obligee through the failure of such marshal, to effect the faithful performance of duties by himself and his deputies during his continuance in office . . .
>
> (2) against any loss or losses which any individual now or hereafter filling any other position(s) in the Schedule of Positions, . . . may directly or by collusion with others, cause to the Obligee through the failure of such individual while filling such position to effect the faithful performance of the duties . . ."

The term of the bond was from 12:01 a.m., January 1, 1972, to midnight, December 31, 1973. The particular bond in question is no longer in force. The United States of America no longer obtains surety bonds such as the one involved in this action. All such surety bonds for Federal, Civilian and Military personnel have been eliminated. (Pursuant to Public Law 92-310, 86 Stat. 201.)

II

The Writ of Certiorari Should be Denied for Reason That This Case Does Not Concern an Issue of Public Importance or of a Prospective Nature.

The petition concerns itself solely with the dismissal of Hanover from the action. The United States District Court presently has before it, for further proceedings, those aspects of the case which involve the conduct of the United States Marshal and his deputys. It is submitted that that if this case contains any issues of importance beyond the parameters of the case itself,

these issues pertain only to the conduct of the United States Marshal and his deputies.

The petition concerns itself with a very limited question of pertinence, only to James Sinclair and Hanover. The surety bond has expired by its own terms, and Congress, in 1972, rendered this matter a dead issue as concerns the general public by enacting Public Law 92-310 (86 Stat. 201). The statute provides in pertinent part as follows: "No agency of the Federal Government may require or obtain surety bonds for civilian employees or military personnel in connection with the performance of their official duties." (P.L. 92-310, Title 1, § 101 (a), June 6, 1972, 86 Stat. 201.)

In view of the action of Congress, this case has no prospective application and is of such isolated significance, that it should not be before the Supreme Court. The concluding statement of this Court in *Rice v. Sioux City Memorial Park Cemetery* (349 U.S. 70, 75 S. Ct. 614 (1955) is dispositive of the petition before the court and compels its denial. The Court stated,

> "'. . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.' Layne & Bowler Corp. v. Western Wells Works, Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712.
>
> Writ of certiorari dismissed." (349 U.S. at 79, 75 S.Ct. at 619-620).

Conclusion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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By THOMAS J. CASAMASSIMA,
Attorneys for Respondent
The Hanover Insurance Company.

Supreme Court, U. S.
FILED
JAN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

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No. 76-584

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Respondents.

Petitioners' Reply to Opposition Memorandum of the Hanover Insurance Company.

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Petitioners' Reply to Opposition Memorandum of the Hanover Insurance Company.

I

This Case Concerns Issues of Both Public Importance and Prospective Nature and Therefore Warrants Grant of Certiorari.

28 U.S.C. Sec. 564(c) stated:

> "A person injured by a breach of a United States marshal's bond may sue thereon, in his own name, to recover his damages. Such an action shall be commenced within six years after the right accrues, but a person under legal disability may sue within three years after the removal of his disability. After judgment, the marshal's bond shall remain as security until the whole penalty has been recovered."

Hanover's memorandum in opposition page 3 states that their bond extended "to midnight, December 31, 1973". Therefore for six years thereafter, through 1979, this bond could be sued upon by all and sundry parties injured by marshals, and even in later years for "a person under legal disability". Hanover did not dispute the Petition for Certiorari (pages 6 and 7) to the effect that this bond covers *93* Marshals nationwide for over $3,000,000.00 for airport search abuse so prevalent that an exclusionary rule has been legislated!

This shows both "Prospective Nature" and wide "Public Importance" of this case.

The statute referred to by Hanover terminating the purchasing of future surety bonds saved to the United States all rights on existing bonds. Further, no insurance company which has previously been paid its premium can be heard to argue (nor did Hanover) that it is entitled to unconstitutional impairment of its contractual obligations to intended third-party beneficiaries or to be unjustly enriched by refusing payment to a person suing in the name of the United States for his own Use as permitted by *United States v. Davidson,* 25 Fed. Cases 771, Case # 14,921 (1864). The new statute provides for injuries after its effective date to be paid for by the federal government; the basic public policy is thus for payment in one way or another of judgments for damages done by marshals.

Another issue is the Second Question presented for review in the petition for writ of certiorari (pages i and 2 and 7). The question of the liability of the Marshal for his deputy has been of public importance for over 100 years, and will continue to be so as

long into the future as there are United States courts themselves, as the Marshal works for these courts.

Further, the bond preceding that bond written by Hanover is also still open for suit, even without considering the tolling procedures. This leaves at least one other insurance company affected by this case. These bonds further cover much more than airport cases, and therefore many more citizens need these bonds to recover on property and personal causes of action.

Finally, it is important to preserve Constitutional rights, and to encourage suit to assert said rights before they vanish from disuse; if suit were a waste of money because the bonding company had the only money and was to be improperly dismissed from the suit, few could sue to assert their Constitutional rights.

II

Hanover Admits the Judgment Should Be Reversed.

By its failure to deny Petition page 6 that the bond stated: "A person . . . may sue thereon in his own name", Hanover admits the Court of Appeals erred in holding petitioner could *not* sue. Hanover *does* say the bond *also* indemnifies the United States of America, but no one ever questioned that the United States could also sue on the bond.

As expressly predicted in the 3rd paragraph on page 5 of the Petition, Hanover has failed to state *any* decisions in opposition to the decisions cited in the Petition. The thrust of Hanover's specious argument appears to be that Hanover should be given the benefit of the grievous error in fact of the Court of Appeals because said court relied on the chance that this Court would not review the case as not important enough.

It could well be argued that the principle of supervising the operation of the lower courts of the federal system is itself of such Public Importance and of Prospective Nature so that some decisions of the Court of Appeals which are so unsupportable as neither it, nor Hanover here, can cite one decision in support, should be summarily reversed merely to keep the lower courts alert to their duty and to their being supervised under Supreme Court Rule 19(1.)(b) (phrase 5, among others).

December, 1976.

Respectfully submitted,

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